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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

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DANIEL MURPHY and ALBERT MENDES,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1966

DANIEL MURPHY and ALBERT MENDES,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Daniel Murphy and Albert Mendes, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered March 10, 1967. The opinion of the Court of Appeals is printed in the Appendix to this petition (A1-8).*

Jurisdiction

The judgment of the Court of Appeals was entered on March 10, 1967 (A9) and a timely petition for rehearing was denied on March 30, 1967 (A10-11). The time to file this petition was extended from April 29, 1967 to May 20, 1967, by order of Mr. Justice Harlan, dated April 25, 1967 (A12).

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* References to the Appendix will be preceded by the letter "A." All references without such designation will be to petitioners' Appendix in the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Where the conviction of petitioners rested on the uncorroborated word of participants in the crime, all of whom testified under grants of immunity, and the simple question for the jury's determination was one of credibility as to whether or not petitioners received Christmas gratuities in violation of the Taft-Hartley Act, were petitioners deprived of a fair trial in violation of their constitutional rights, by reason of inflammatory and prejudicial remarks of the prosecutor during his summation, as follows:

(a) Petitioners were accused of committing numerous other offenses not charged in the indictment, and as to which the record is devoid of supporting evidence. The charge in the indictment involved the alleged receipt of approximately $5,000.00 by petitioners from four employers over a five-year period. On the basis of the prosecutor's inflammatory suggestion, the jury was rather led to infer that petitioners had, in fact, received many thousands of dollars from numerous employers as to which they were never brought to justice.

(b) Petitioners were further accused, without any evidentiary support in the record (or on the basis of "tenuous inference", at best, as noted by the Court below [A6]), of having engaged in extorsive conduct resulting in the extraction of the funds in question from various employers. The inexorable result of the combined arguments by the prosecutor as to the commission of other offenses and extorsive conduct was to

unfairly depict petitioners before the jury as wholesale offenders engaged extensively in the shakedown of employers.

(c) The prosecutor further argued to the jury that the grant of immunity to the Government witnesses demonstrated that a crime was committed, consisting of the receipt of the monies by petitioners, thus misleading the jury in their determination of the ultimate issue presented and unfairly pitting the belief and prestige of the Government against petitioners.

2. Whether prejudicial remarks by the prosecutor can properly be deemed cured and the prejudice eradicated from the jury's mind by an instruction of the trial court which (a) fails to affirmatively instruct the jury to disregard and ignore the remarks; (b) further fails to admonish the jury that the prosecutor's inflammatory suggestion is devoid of evidentiary support; and (c) where the prosecutor returns to the prejudicial argument after the alleged curative instruction is given by the court.

3. Whether in the prosecution for a crime, *malum prohibitum* in nature, involving as its principal element the mere receipt of money by the accused, without more, the Government should be allowed to circumstantially show an extorsive motive on the part of the accused by reference to the alleged existence of a motive for payment of the money on the part of the payors, such motive for payment being dependent upon the operation of the mind of the payors and there being no proof that such frame of mind was instigated by, or ever communicated to, the accused.

Statutes Involved

The statutes involved in the indictment are 29 U.S.C. Section 186, and 18 U.S.C. Section 2. The constitutional provision involved is the Fifth amendment to the United States Constitution. All are printed in the Appendix hereto (A13-18).

Statement

Petitioners were convicted in the United States District Court for the Southern District of New York, upon a jury verdict, for accepting payments of money, as Labor Union officials, in violation of 29 U.S.C. §186 and 18 U.S.C. §2 (116a-19a). They were sentenced to maximum prison terms of one year.

During the relevant period in question, petitioners were the financial secretary and business agent, respectively, of Local 580, National Association of Bridge, Structural and Ornamental Ironworkers AFL-CIO (67a, 81a).

The indictment (4a-6a) contained 17 counts, charging petitioner Murphy in counts 1 through 15 and petitioner Mendes in counts 1 through 5, 16 and 17. It was alleged that during a five-year period from 1960 through 1964, inclusive, petitioners received payments of money from four employers in the aggregate sum of approximately $5,000. The alleged payments were confined to the month of December in each year. With the exception of three payments from one employer in the alleged amount of $1,000 each, the other 14 payments charged varied in amounts from $100 to $200, totalling $1,975.

The case of the Government at trial rested entirely upon the uncorroborated word of the four employers involved. Each employer testified under grant of immunity from the Department of Labor, and claimed to have made payment to petitioners of money during the Christmas season in each year, as charged in the indictment.

Briefly to summarize the highlights of their testimony, the first employer, one Wander, claimed that in December, 1960, he gave a "Christmas present" of $200 in cash to petitioner Mendes, for himself, petitioner Murphy and two others (10a-11a). There was further testimony as to the delivery of Christmas gifts during the next three succeeding years, consisting of envelopes containing $25 in cash and totalling $100 in each year, allegedly delivered through an employee of Wander, for petitioners and two others (11a-12a, 25a-28a). The second employer, one Davis, testified as to the delivery of envelopes with $1,000 in cash during the months of December in 1961 through 1963, on which occasions he expressed "A happy holiday for the season" (31a-33a). A third employer, one Hirschberg, testified to having extended "season's greetings" with the delivery of four envelopes, each containing $50 in cash, for petitioners and two other union representatives, during the years 1961 through 1963 (48a-49a). The fourth employer, one Perlman, claimed to have given envelopes, containing a total of $100 in cash, during the month of December in the years 1960 through 1963 (60a-62a).

The Government's attempt to corroborate the testimony of the employers by reference to certain records completely failed (See A3, n. 3). Petitioners took the stand and categorically denied ever receiving any payments from the

said employers (70a-71a, 82a-85a). They also called six character witnesses, mainly representing management, who testified as to their excellent reputation for truthfulness and honesty (88a-92a). Accordingly, the issue presented in this case was a simple one of credibility (as both courts below and the parties recognized [See 94a, 106a-08a; A3]), as to whether or not petitioners received certain specific Christmas gratuities from four employers.

REASONS FOR GRANTING THE WRIT

1. The prosecutor's suggestion as to the commission of numerous other offenses by petitioners and his characterization of the crimes committed as extortion, all without adequate foundation of fact in the record, served to depict petitioners as wholesale offenders engaged in far more serious crimes than those charged, thus depriving petitioners of a fair trial and prejudicing a just determination of their cause by the jury.

The first incident of which petitioners complain arose during summation when the prosecutor sought to fashion—improperly, we submit—a motive on the part of the employers for the payments claimed to have been made by them to petitioners. Thus, the prosecutor submitted the following question for response:

> "Well, why were these union officials treated differently from the other people who got liquor? Or, to state the question another way, why—why were these so-called Christmas payments made?" (98a).

Immediately following was the answer of the prosecutor, which pointedly introduced a lurid element into the case on two scores: First, it was suggested, without foundation of

fact in the record, that the payments allegedly made to petitioners were extorsive in nature, being the fruits of a shakedown—as opposed to mere Christmas gifts. Second, it was insinuated that the shakedown was far broader in scope than the actual charge in the case, which involved only four employers. The prosecutor wrongfully sought to include all employers with whom petitioners dealt, without the benefit of a charge in the indictment as to dealings with such employers or evidence to support it—thus, depicting petitioners as wholesale offenders, reaping enormous sums of money illicitly.

The answer of the prosecutor to his self-posed question was accordingly as follows:

> "A Christmas payment is usually $5, a bottle of liquor, $10. These really weren't Christmas payments, but *they were something else.* Here we are talking about roughly $5,000 for a four-year period from four employers. *And how many other employers did these union officials represent?* (98a; emphasis supplied).

The "something else" to which the prosecutor had reference (as he abundantly made clear later on) was extortion. As to the transactions with the "other employers", not charged in the indictment, the insinuation was that petitioners had received hundreds of thousands of dollars, as opposed to the mere $5,000, or so, as to which there was evidence in the record.

To demonstrate the impact of the prosecutor's suggestion, the testimony showed that approximately 350 employers dealt with the union (87a). The mathematical computation suggested to the jury by the prosecutor was

accordingly an easy one—to wit, $1,250 per employer multiplied by 350 for a grand total of over $400,000, allegedly extorted by petitioners over a four-year period.

When these remarks were made by the prosecutor, counsel for petitioners immediately objected and moved for a mistrial (98a). The trial court, while agreeing that the reference to other transactions was improper as "not within the case", did not think that a mistrial was indicated (98a). An instruction was given, instead, whereby the jury were asked to "confine" their attention (as the Circuit Court characterized the matter [A4]) to the specific offenses charged (99a). They were not affirmatively instructed, however, to disregard the prejudicial matter. Nor were they told that the accusation was utterly without foundation in the record.

Subsequent to the instruction by the trial court, the prosecutor persisted in the matter. Abandoning for the moment the accusation of other crimes not charged, he returned immediately to build upon the theme of extortion and shakedown. The prosecutor accordingly continued as follows:

> "Why did these employers make these payments? That is the important question. Well, you have to understand the industry. And you heard it from all of the witnesses. Murphy admitted to it. Nash talked about it. Other witnesses talked about it. When you need men, you call up the union hall and the union hall sends these men to these various construction jobs. Now, it is quite obvious. *You have some good workers in that union hall and there are some very bad ones.* And if you look at the contracts, you will see that the wage rate for the iron workers belonging to Local 580 are roughly $4 or $5 an hour.

Now, no employer, businessman, who is trying to make money can afford to pay $4 or $5 an hour to an incompetent. He needs a good man. *He doesn't want to antagonize these two people because these people can give him a very rough time in their business.* These witnesses for the government are businessmen. They want to make money, like you want to make money. You are businessmen also. And that brings up another point.

These two men are still union officials. These employers have no stake whatsoever in antagonizing these two people. *These two people have the power to send these employers poor workers day after day.*" (99a; emphasis supplied.)

Thereafter, and towards the end of summation, the dual theme of extorsive power and offenses not charged was brought up again. Thus, it was argued by the Prosecutor, as follows:

"Now, the other point to remember about the defendants' testimony is that both of them said never, *never within these years* did they take so much as one cent *from any employer,* never, which is the biggest word I think in the language. *Can you really believe that these two people who sit with the power that they have never took anything at any time?* That is what they are asking you to do. If you believe that they never took *anything at any time* within these four years, then you should believe them and acquit them. *But if you use your common sense and understand the nature of their position and understand who they are, I am sure you can't believe that they never took so much as one penny.* And I think that is the real hint in the case. It is an impossible thing to put forth on the stand, such a position, and it shows that they

are incredible and unbelievable witnesses." (102a; emphasis supplied.)

After the court's charge to the jury, counsel for petitioners, referring to the prosecutor's suggestion of illicit use of power by petitioners, asked for a limiting instruction (111a-12a), which the trial court refused (112a).

The general rules applicable to argument by the prosecutor during summation are well established. "It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented; or to make unwarranted inferences or insinuations calculated to prejudice the defendant" (*Dunn* v. *U.S.*, 307 F. 2d 883, 885-86 [5th Cir., 1962]). Although "counsel may suggest such legitimate inferences as could be drawn from the evidence produced at the trial, he may not refer to prejudicial facts having no basis in the record, or draw upon conjecture" (*U.S.* v. *Schwartz*, 325 F. 2d 355, 358 [3rd Cir., 1963]).

The remarks of the prosecutor in the case at bar, we submit, violated these well-established principles for trial conduct, and effectively served to deprive petitioners of a fair trial.

There was not a shred of evidence in the record to support the insinuation of the prosecutor that petitioners were guilty of the commission of other crimes; and the repeated characterization by the prosecutor of the crimes allegedly committed as extortion was equally lacking in evidentiary support.

In contrast to the prosecutor's claim of alleged extortion, the witnesses for the Government uniformly testified that

the alleged payments to petitioners were Christmas gratuities and nothing more. It appears, moreover, from the testimony of the four employers involved that the entire matter unilaterally sprung from them. There was no evidence of any solicitation, demand or threat by petitioners respecting these gratuities; nor was there any proof that the employers were impelled to act by any force, violence or fear engendered by petitioners, or any instigation whatsoever on petitioners' parts. Such are the elements of a prosecution for extortion (see, e.g., 18 U.S.C. § 1951 [b] [2]; *Bianchi* v. *U.S.*, 219 F. 2d 182, 190-3 [8th Cir., 1955]), which the prosecutor improperly sought to inject into the case, with all of its inflammatory ramifications.

Focusing on the specific accusations made by the prosecutor, there is no evidence in the record that petitioners possessed the unbridled "power", as the prosecutor inferred, to send the employer-witnesses "poor workers day after day"; or to give the employer's "a very rough time" (99a; emphasis supplied). Nor is there evidence that petitioners ever, in fact, sent these employers poor workers, that they gave them, in fact, a rough time, or that they ever threatened or attempted to do so. Similarly, there was no testimony as to an intention, desire, or lack thereof, on the part of the employers to "antagonize" petitioners, as mentioned by the prosecutor (99a). Moreover, the evidence as to the workers connected with the union was not even sufficient to permit their characterization by the prosecutor as "good", "very bad", "poor", or otherwise (99a).

We submit that this entire matter, combined with the insinuations as to other crimes, was but an improper attack by the prosecution upon petitioners' character and an at-

tempt to depict them as evil men—indeed, thugs. The overall portrait presented to the jury was one of wholesale trafficking by petitioners in the illicit use of union power. Such a portrayal was entirely unjustified and had no rightful place in the prosecution of the case at bar. This was a simple case with a very limited issue for determination. The issue on the evidence was simply whether or not petitioners received certain specific Christmas gratuities from four employers—a crime, *malum prohibitum* in nature, under the Taft-Hartley Act (*U.S.* v. *Ryan*, 350 U.S. 299, 305, 100 L. ed. 335, 76 S. Ct. 400 [1956]). The prosecutor in his summation, however, went far beyond this simple issue; and in light of the rulings below, was permitted to have a conviction returned for a lesser crime by improper argumentation, without evidentiary support, as to the commission of other and far more serious crimes of a venal nature.

In our view, either the insinuations as to the commission of other crimes or the allegations of extortion and shakedown, standing alone, were sufficient to violate petitioners' rights to a fair trial and prejudice a just determination by the jury of the simple issue as to the receipt, or not, of mere Christmas gratuities. Certainly, in combination, such a result was inevitable.

The Circuit Courts of Appeal for the Fifth and Third Circuits have held in situations not unlike those presented in the case at bar, that the rights of an accused to a fair trial have been violated, ordering a reversal of their convictions. (See e.g., *Wagner* v. *U.S.*, 263 F. 2d 877, 883 [5th Cir., 1959]; *Dunn* v. *U.S.*, *supra*, 307 F. 2d 883, 886 [5th Cir., 1962]; *U.S.* v. *Lynch*, 366 F. 2d 829, 831-2 [3rd Cir., 1966]; Cf. *Blumberg* v. *U.S.*, 222 F. 2d 496, 500-01 [5th Cir.,

1955]; *Ginsberg* v. *U.S.*, 257 F. 2d 950, 954 [5th Cir., 1958]; *U.S.* v. *Schwartz, supra*, 325 F. 2d 355 [3rd Cir., 1963]).

In the *Wagner* case, *supra*, the charges involved conspiracy to defraud and bribery in connection with the sale of certain fuel oil by defendants to the Government. The prosecutor in summation—allegedly responding to the claim that one of the defendants, Peek, did not make any money on the transactions in question—argued, in part, that he "can't get too concerned about that"; that he has "an idea that Peek did make some money"; in fact, he "think[s]" that "Peek was in the business and he made a lot of money." The Third Circuit, after noting that relatively small amounts of money were involved in any profits made from the sale of fuel oil to the Government during the period covered by the indictment, held that

> "This argument was a plain effort to have the jury believe that Peek and Wagner were guilty of other and more profitable frauds. It was a wholly impermissible development of a theme on which Government counsel had reached the outer limits of proper argument in his opening * * *." (263 F. 2d at p. 883).

It was ruled that injection of the matter into the case, combined with other improper remarks by the prosecutor during the summation, constituted plain error requiring reversal—notwithstanding the absence of objection by counsel (*Id.* at p. 884).

In the *Dunn* case, *supra*, defendant was charged with income tax evasion. The Government claimed that while serving as Mayor of a city, defendant received payments from the city and contractors and suppliers dealing with the city and county, which were never reported. During sum-

mation, the prosecutor made a statement to the effect that "all politicians took kickbacks on contracts such as these." The court commented on this, as follows:

> "At the time Dunn was the elected Mayor of the City of Baxley. The case against Dunn on this point rested on the veracity of DeLaigle. To insinuate that Dunn must have gotten the money from DeLaigle because Dunn was a politician and that their relationship was a nefarious political deal, was improper and prejudicial" (307 F. 2d at p. 886).

The court held this to be reversible error, notwithstanding an attempt by the trial court to give a corrective charge.

We submit, indeed, that the insinuations of the prosecutor in the *Dunn* case, which the Circuit Court found to be so egregious, are akin to those of the prosecutor in the case at bar. Not unlike the claim in *Dunn* that "all politicians took kickbacks," the prosecutor in our case emphasized petitioners' position as union leaders, hitting with "power", and inferred that in view of the "nature of their position," they were regularly on the take, involved in nefarious dealings of an extorsive nature (102a, 99a).

The decisions above-cited, typified by the *Wagner* and *Dunn* cases, *supra*, we submit, are indicative of a trend in the Fifth and Third Circuits, which stands in contra-distinction to the view obtaining in the Second Circuit, where a reluctance to reverse is evident—even though impropriety on the part of the prosecutor is conceded. Thus, the Court below, while declining to reverse, generally noted that the remarks of the prosecutor in the case at bar evidenced "a lack of restraint" (A2), and that "greater care and restraint" should have been shown "in arguing the matters of which the appellants complain" (A8). As to the specific matters

involved, the Court of Appeals held "that it would have been better" if the insinuation as to other offenses had not been made (A4), and that the argument on extorsive motive was dependent upon a request by the prosecutor that the jury "draw a somewhat tenuous inference" (A6).

The further views expressed by the Court of Appeals as to these matters in its opinion—specifically, the effect to be accorded the curative instruction given as to the commission of other offenses and the relevance of argument on extorsive motive, give rise to separate issues for review by this Court in the interest of the proper administration of criminal justice in the Federal Courts, and are hereinbelow discussed.

2. The instruction given by the trial court was entirely inadequate to eliminate the prejudice engendered, failing to satisfy the minimum standards for curative instructions in accordance with prevailing decisional law in the Federal courts.

After counsel had objected to the insinuation of the prosecutor as to the commission of other offenses by petitioners, and moved for a mistrial, the trial court charged the jury, as follows:

> "Gentlemen, the issue in this case is contained within the indictment that is charged. These men are accused of these 17-odd crimes here and that is our only problem: Are they guilty or not guilty of those charges, and nothing else" (99a).

The Court of Appeals regarded this instruction as "sufficient to overcome any prejudice" (A4). We submit, however, that the nature of the accusation was such that it

could not be eradicated from the minds of the jury; and holding otherwise is to indulge a fiction. As the Court of Appeals for the Fifth Circuit stated in the *Dunn* case, *supra*, " 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.' " (307 F. 2d at p. 886; see also *U.S.* v. *Schwartz, supra*, 325 F. 2d at p. 358; *Ginsberg* v. *U.S., supra*, 257 F. 2d at p. 953; Cf. *Wagner* v. *U.S., supra*, 263 F. 2d at p. 884).

In any event, even if it be assumed that the prejudice could have been corrected by admonition from the bench, it is submitted that the trial judge in this case did not go far enough. Thus, the jury was not positively instructed to ignore the comment, or affirmatively urged to disregard its implications. Rather, as the Court of Appeals noted in its opinion, the jury, at best, was urged to "confine" its attention to the specific offense charged (A4). An instruction to "confine" one's mind to a matter can hardly compare with a direction to ignore and disregard—which we submit (without conceding that it would have cured the prejudice) was indicated here, at the very least. Furthermore, if the matter be deemed curable by a proper instruction, the jury also should have been told that the insinuation of the prosecutor was baseless, without any evidentiary support in the record.

In *U.S.* v. *Schwartz, supra*, the Third Circuit ruled, as we urge, that a curative instruction must embody, as a bare minimum, an affirmative direction to "*disregard*" the prejudicial matter (325 F. 2d at p. 358; emphasis supplied). Indeed, the very cases cited by the Court of Appeals in its opinion below (A4), support this view, and stand at variance with the determination rendered by that Court herein.

Thus, in *U.S.* v. *Caruso*, 358 F. 2d 184 (2nd Cir. 1966), the trial Court "promptly and properly instructed the jury to *disregard*" the remark (*Id.* at p. 186; emphasis supplied). Similarly, in *U.S.* v. *Courtney*, 257 F. 2d 944 (2nd Cir. 1958), where the prosecutor made reference in his opening to defendant's failure to answer before the grand jury, the trial court instructed the jury in a positive manner that defendant had "a perfect right to refuse to answer questions before the Grand Jury;" and further offered to charge the jury that they must "*disregard*" the prosecutor's remark (*Id.* at p. 947; emphasis supplied). So too, in *U.S.* v. *Stromberg*, 268 F. 2d 256 (2nd Cir. 1959), also cited by the court below, the possible prejudicial effect of one remark by the prosecutor was deemed cured by immediate court reproval of the prosecutor and admonition to the jury that "the remark was to be *disregarded*" (*Id.* at p. 271; emphasis supplied).*

In holding that the instruction was sufficient, the Court of Appeals in the case at bar also overlooked the fact that after the instruction was given by the trial judge, the prosecutor returned to the prejudicial theme once again. Accordingly, even if the instruction be deemed to have had some salutary effect, the repetition of the matter by the prosecutor, in substance, totally negated the effect of the instruction and revived the prejudice.

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* The other remarks challenged by appellants in the *Stromberg* case were deemed harmless for reasons which render it further distinguishable from the case at bar. Thus, a "fiercely contested" (268 F. 2d at p. 269) and "long trial" was involved (*Id.* at p. 271). Moreover, the remarks were viewed generally as "no more than fair and vigorous advocacy," also being "in response to arguments made in the summations for the appellants." (*Id.* at p. 272).

Thus, as we have seen, after the instruction was given, the prosecutor stressed that in his estimation the jury could not believe that petitioners failed to take money from "*any* employer", or that they failed to take "anything at *any* time;" and further that if the jury used its "common sense" and understood "the nature of their position" and "who they are", they could not "believe that they *never* took so much as *one* penny" (102a; emphasis supplied).

This argument was not confined to the crimes charged in this case. Its scope was rather far-reaching, encompassing the prior impermissible suggestion of the prosecutor. In its light, the jury was essentially being told that in view of petitioners' dealings with so many other employers—in addition to the four actually involved in the case—one could not believe that they never took a single Christmas gratuity. The jury was accordingly urged to convict for crimes charged in the indictment on the basis of speculative inference, unsupported by proof, as to the probable commission by petitioners of other crimes, not charged. By the same token, the jury was improperly imbued with the sentiment that petitioners were lucky to be let off by a charge involving only four employers; and hence, could not complain if a conviction were returned—even if the proof as to those four employers were doubtful in the jury's minds.

We believe it is sound doctrine that the "government cannot go on * * * making such remarks and having the court strike them out, and then claim they had no effect" (*Kitchell* v. *U.S.*, 354 F. 2d 715, 719 [1st Cir., 1965]). Such was the situation at bar.

3. The reasoning of the court below as to the propriety of showing motive, constitutes a misapplication of doctrine and establishes a dangerous precedent, prejudicial to a defendant's rights, in the administration of Federal criminal justice.

In discussing the prosecutor's attempt to characterize the crimes involved herein as extortion, the Court of Appeals reasoned that "the Government may prove motive as circumstantial evidence that an offense was in fact committed even where such proof might incidentally show the commission of another offense" (A 5-6). We do not quarrel with this statement of general rule. It is submitted, however, that it has no application to this case; and that the holding below to the contrary is unique and establishes a dangerous precedent in the administration of Federal criminal justice.

The prosecutor's remarks in the case at bar involved at best a motive on the part of the employers, perhaps indicating the commission of an act by them. Thus, upon examination of the pertinent remarks of the prosecutor (99a, 102a), we find their thrust essentially to have been that the *employers* allegedly did not want to antagonize petitioners, that *they* were afraid of the possible misuse by petitioners of union power, which could result in grave economic harm to *them*. These were all matters relating to the employers' frame of mind and general circumstance.

Such factors, however, would only go to explain a possible motive on the part of the employers to *give* money. But the fact that the employers may have had a motive to give, can hardly serve to prove a motive on the part of petitioners to *receive* the money, which was the controlling issue in the case.

The effect of the holding below as to the relevancy of the argument on motive, therefore, is that the existence of a reason in one person's mind to do an act can serve as circumstantial proof of another person's frame of mind or the performance of an act by such other person—even though there is a complete absence of proof that the other person was aware of the operation of the first person's mind. This is dangerous doctrine, in conflict with prevailing law, and indeed, the authorities cited by the Court below (A 6).

Thus, in *U.S.* v. *Houlihan*, 332 F. 2d 8 (2nd Cir.) *cert. denied*, 379 U.S. 828 (1964), involving charges of mail and wire fraud and the interstate transportation of stolen securities, certain proof as to motive was admitted, consisting of financial difficulties of defendant which might induce him to participate in the fraud. It was also shown that he benefited from a related fraudulent transaction (332 F. 2d at pp. 14-15). These circumstances bore directly upon a motive by defendant—not a third party—to perform the criminal acts in question; and were accordingly provable under traditional doctrine.

In *U.S.* v. *Johnson*, 254 F. 2d 175 (2nd Cir.) *appeal dismissed*, 357 U.S. 933 (1958), it was shown in a conspiracy, mail theft and forgery prosecution that narcotics were purchased with the proceeds of a check and used by defendant. This proof was deemed permissible because it showed that defendant shared in the fruits of the conspiracy and accordingly had a motive to join. There too, then, the acts directly involved defendant and evidenced a motive on his part.

So too, it is reasoned by Professor Wigmore that in connection with motive our focus is upon the mind of the

defendant and we are concerned with a state of mind or emotion on his part, which explains or proves the doing of an act by him (1 Wigmore, Evidence §§117-118); and that the

> "circumstances said to have excited the emotion *must be shown* to have probably *become known* to the person; because otherwise it could not have affected his emotions."

(2 Wigmore, Evidence §389, p. 329).

As we have indicated, the contentions as to motive in this case do not meet the foregoing requirements—being confined to a frame of mind on the part of the employers, not proven to have been known by petitioners and further not involving the performance of an act by them.

We also maintain that the reasoning of the Court below that the "tenuous inference" which the prosecutor was permitted to draw did not constitute reversible error since it went "only to motive and not directly to the ultimate issue of guilt or innocence" (A6) is unsound. As a practical matter, the prosecutor's argument bore heavily on the ultimate issue of guilt or innocence. The result of the prosecutor's argument on extortion—coupled with the prior allusion to other offenses—was to inject a sordid atmosphere into the case, whereby petitioners were unfairly portrayed as evil men, ruthlessly using union power to intimidate. Where a defendant is thus unfairly stigmatized, it can hardly be gainsaid that the jury is influenced in its determination of the ultimate issue of fact upon which guilt or innocence depends.

4. Petitioners' rights to a fair trial were further violated by reason of the additional argument of the prosecutor during summation as to the weight and effect to be accorded the grant of immunity to Government witnesses, which argument served to mislead the jury and unfairly pitted the belief and prestige of the Government against petitioners.

In addition to the inflammatory argument of the prosecutor as to the commission of other offenses and extortion by petitioners, a third incident occurred during summation which also served effectively to deprive petitioners of a fair trial. Misleading argument was utilized and personal belief on the part of the prosecutor and Government, as well as their prestige, was invoked. The matter arose when reference was made to the immunity from prosecution granted to the Government's witnesses. The prosecutor stated, in relevant part, as follows:

> "The immunity which was granted to these witnesses was granted by the Department of Labor. *Now, the Department of Labor isn't going to grant immunity if no crimes have been committed.* And the immunity relates to the testimony that the witnesses give." (100a; emphasis supplied)

He then continued to discuss the matter of immunity and concluded with the following, which we submit transcended all bounds of propriety:

> "So *I think* the fact that each of these people received immunity *shows that they did this crime, that these defendants received the moneys which the government witnesses admitted to.*" (100a; emphasis supplied)

The fact that the Government chose to grant immunity to the witnesses is hardly competent proof that "crimes have been committed"—or that petitioners "received the moneys which the Government witnesses admitted to," as the prosecutor contended. Such argument was improper and misleading. It was worse, we submit, than telling the jury that indictment by the Government constituted proof of guilt.

The prosecutor was also telling the jury by means of the foregoing that it was his personal belief, and more particularly, the United States Department of Labor, that petitioners, as a certainty, committed the crime charged, otherwise immunity would not have been conferred upon the employers.* The ultimate effect of this argument was also to unfairly place the power and prestige of the prosecutor, his office, and the Department of Labor on the line against petitioners. From the jury's point of view, the mere denials of petitioners that they took money, could not measure up to the beliefs and opinions to the contrary, expressed as a matter of certainty, of such august bodies as the U.S. Attorney's office and Department of Labor of the United States Government.

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* Our position that the instant argument by the prosecutor involved the expression of personal belief, does not exclusively turn upon use of the phrase "I think", as the Court of Appeals indicated in its opinion (A7). It is our contention rather that the *entire* argument on the matter involved the expression of belief by the prosecutor and invocation of the prestige of Government office. As above indicated, the argument, of necessity, was dependent upon personal belief. Thus, the Government was essentially saying that if it did not believe the witnesses, immunity would not have been granted to them; or put another way, since the Government chose to believe the employers, as evidenced by the grant of immunity, this should be accepted as conclusive on the issue of receipt of money by petitioners.

The introduction into the case of such matters as the personal beliefs of the prosecutor and the prestige of his office and the Federal Government, violated well-established rules for the conduct of trials in the Federal courts. (See, e.g., *Greenberg* v. *U.S.*, 280 F. 2d 472, 474-5 [1st Cir., 1960]; *U.S.* v. *Spangelet*, 258 F. 2d 338, 342-43 [2nd Cir., 1958]; *U.S.* v. *Pepe*, 247 F. 2d 838, 844 [2nd Cir., 1957]; *Cf. Reichert* v. *U.S.*, 359 F. 2d 278, 281-2 [D.C. Cir., 1966]).

The Court of Appeals recognized in its opinion that at least one aspect of the prosecutor's argument as to the effect of the grant of immunity "was, of course, improper" —namely, to the extent that "the granting of immunity to the four contractors should be taken as evidence that the crimes had been committed" (A7). The Court proceeded to reason, however, that the prosecutor was talking at that point "about the crimes committed by the contractors in paying the moneys; not about the guilt of the defendants" (*Ibid.*).

We respectfully submit that the jury was incapable of making such a subtle distinction. The seed having been planted in their minds that immunity was conclusive on the issue of "crimes hav[ing] been committed", and that the employers "did this crime" (100a), it must presumed that they took the next step and concluded impermissibly that this also conclusively proved the commission of a crime by petitioners—or, as the prosecutor squarely put it, "that these defendants received the moneys * * *." (100a).

The Court of Appeals further sought to ascribe benign implications, in context, to the prosecutor's argument, by reasoning that this was but an argument "to persuade the jury that it ought to believe the Government witnesses"

(A8). This is to ignore, however, the sheer force and weight of the prosecutor's contention on the matter of immunity. The argument involved more than mere credibility. The Government essentially lifted itself by its own bootstraps, plainly stating that immunity would not have been granted "if no crimes had been committed", and that the grant of immunity demonstrated that petitioners "received the moneys which the Government witnesses admitted to." We submit that no amount of rationalization can serve to mitigate the misleading and prejudicial effect of such an argument.

The argument of the prosecutor on immunity, in our view, was sufficiently misleading and prejudicial to constitute plain error, qualifying as an error which "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings"—as stated by this Court in *U.S.* v. *Socony Vacuum Oil Co.* (310 U.S. 150, 239 [1940]). The absence of objection thereto by counsel, therefore, should not be deemed determinative.

The entire issue of the weight which can be accorded to a grant of immunity by a prosecutor in support of the Government's case and as corroboration of Government witnesses, if at all, appears to be a question of first impression in this Court. In light of the extensive use of immunity grants in Federal prosecutions, it is submitted that the promulgation of guidelines by this Court is indicated, which will obviate the recurrence of misleading and prejudicial argument such as occurred in the case at bar.

CONCLUSION

This was a close case. The trial below was neither "fiercely contested" (*U.S.* v. *Stromberg, supra,* 268 F. 2d at p. 269; *see also U.S.* v. *Schwartz, supra,* 325 F. 2d at p. 358) nor "prolonged" (*U.S.* v. *Socony Vacuum Oil Co., supra,* 310 U.S. at p. 240), and evidence of guilt was hardly overwhelming (*See U.S.* v. *Gorman,* 355 F. 2d 151, 153-4 [2nd Cir., 1965]). To the contrary, a sharp conflict of fact was presented in the case at bar and the version of the facts urged by the Government rested entirely upon the uncorroborated word of participants in the crime. Under such circumstances, even the slightest error is regarded as prejudicial—being deemed sufficient to tip the scales and render the trial unfair (*Krulewitch* v. *U.S.,* 336 U.S. 440, 445 [1949]; *Bihn* v. *U.S.,* 328 U.S. 633, 638 [1946]; *Glasser* v. *U.S.,* 315 U.S. 60, 67 [1942]; *U.S.* v. *Persico,* 305 F. 2d 534, 536-7 [2nd Cir., 1962]).

The errors committed in the case at bar and the prejudice engendered, in our view, were far from slight. In a simple matter, involving an issue as to the receipt of Christmas gratuities, *malum prohibitum,* petitioners, as we have seen, were unfairly depicted—without supporting evidence in the record—as wholesale shakedown artists, reaping enormous sums of money from their allegedly illicit activities; and the weight and prestige of the Federal Government was put on the line in resolution of the factual issue presented. Under such circumstances, the jury could not but help to convict petitioners, taking an attitude that these were evil men—lucky to be let off with the minimum offense here charged.

The Court of Appeals acknowledged in its opinion, as we have seen, that error had been committed in respect of the matters as to which petitioners complain, noting that "it would have been better" if the insinuation as to the other offenses had not been made (A3); that as to the alleged matter of extortion, the jury was asked to "draw a somewhat tenuous inference" (A6), and that at least one aspect of the prosecutor's argument on immunity "was, of course, improper" (A7). The Court further generally noted that the remarks of the prosecutor evidenced a "lack of restraint" (A2) and that "greater care and restraint" should have been shown "in arguing the matters of which the appellants complain" (A8). The Court declined, however, to order a new trial.

We maintain that each of the errors assigned in this case, standing alone, was sufficient to prejudicially tip the scales against petitioners, depriving them of their constitutional rights to a fair trial. Certainly, their cumulative effect accomplished such a result.

Under all the circumstances hereinabove set forth, therefore, it is respectfully prayed that the writ of certiorari should be granted.

Respectfully submitted,

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